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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES A. ALLEN,
PETITIONER

VS

THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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96 pp

Questions Presented:

I. Whether an african american employee of an eight (8) employee unincorporated committee, which was created by and exclusively exists to perform lobbying, collective bargaining and other functions for seventeen (17) major railway labor unions, as the agent of the unions, may invoke the jurisdiction of the Federal Court under Title VII, or

Alternatively;

Whether that committee and the unions it represents are exempt from Title VII because the committee, as the "employer" is a legally cognizable "separate economic entity" having an insufficient number of employees (8) to invoke the jurisdiction of the Federal Courts, and also is not a "labor organization" as subject to the expanded jurisdiction of the Federal Courts as contained in the Civil Rights Act of 1991, § 104.

II. Whether the verified pleadings and affidavits of the Plaintiff, the former bookkeeper of the committee, who knew of his own knowledge the organizational structure and operations of the committee, furnished sufficient "evidence" of the non-existence of a separate "entity" for the committee, and that it was merely the agent or an arm of the unions, to withstand a F.R.Civ. P. 12 (b)(1), or a 12 (b)(6) motion to dismiss before any answer and before discovery and without hearing on the afore-stated grounds.

LIST OF THE PARTIES

The petitioner is James Anthony Allen

The respondents are:

1. Edward P. McEntee, Chief Executive of the Railway Labor Executives' Association (RLEA)

2. International Association of Machinists and Aerospace Workers

3. Robert Scardelletti, Chief Executive of the Transportation Communication Union

4. James J. Kennedy, Executive Director of the Railway Labor Executives Association

5. Seafarers International Union (SIU) Labor Cooperative Educational & Publishing Society

6. George Leitz, Chief Executive of the Transport Workers Union

7. American Train Dispatchers Association

8. Brotherhood of Maintenance of Way Employees

9. Brotherhood of Railroad Signalmen

10. Hotel Employees & Restaurant Employees

11. International Brotherhood of Boilermakers & Blacksmiths

12. International Brotherhood of Electrical Workers

13. International Brotherhood of Firemen & Oilers

14. International Longshoremen's Association

15. National Marine Engineers' Beneficial Association

16. Sheet metal Workers International Association

17. Transport Workers Union of North America

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JAMES A. ALLEN,
PETITIONER
VS
THE RAILWAY LABOR EXECUTIVES'
ASSOCIATION, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, James A. Allen, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit to review the judgment and opinion of that court and the court below, which opinion was affirmed on appeal.

Judgments and Opinions below:

The following judgments and opinions below are reprinted in the respective numbered index following.

Judgment and memorandum opinion of the United States Court of Appeals for the

District of Columbia Circuit, December 8th, 1994

a1 to a6

Order of the United States District Court dismissing all claims in both cases. April 2, 1993.

b1 to b3

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Memorandum and Order of the United States District Court, May 11, 1993.

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JURISDICTIONAL STATEMENT

(i) The Orders and Judgments sought to be reviewed are:

Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Entered on December 8th, 1994,

(Ref. a1 to a6)

Judgment(s) of the United States District Court For the District of Columbia

Entered on April 5th, 1993,

(Ref. b1 to b3)

Notices of Appeal were filed on both May 4th and May 5th, 1983, after notification of Plaintiff's counsel that two appeals were necessary in these two previously consolidated cases.

This Court has jurisdiction under United States Code, Title 28 § 1254 (1), to review the final decision of a United States Court of Appeals. All appeals were timely. (See notices Ref. e1 to e4).

STATUTES

Definition of "Employer":

Under Title VII - (42 U.S.C. § 2000 e (b)):

> . . . "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in

the current or preceding calendar year, and any agent of such person. . . ."

Under ADEA (29 USC § 630(b)):

. . . "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.". . .

Definition of "Labor Organization"

The Civil Rights Act of 1991:

Title I - Federal Civil Rights Remedies,

* * *

Sec. 104 Definitions.

Section 701 of the Civil Rights Act of 1964 (42 USC 2000 e) is amended by adding at the end the following new subsections:

* * *

"(n) The term 'respondent' means an

employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or other Federal entity subject to section 717" [emphasis added].

* * *

STATEMENT OF THE CASE:

James A. Allen (Allen) sued his "employer" the Railway Labor Executives Association (RLEA) alleging continuing acts of prohibited employment discrimination, and termination of his employment because he was an African American, and over 40 years of age. He alleged in verified complaints and two affidavits all of the elements of a prima facie case of (both) age and race discrimination. Examples of the factual support of his complaints were:

(1) He was told by a supervisor in

response to a request for a promotion that he would not be promoted because of his race; this failure to promote continued for years.

(2) He was terminated immediately after he applied for the chief executives position;

(3) The persons who replaced his functions were all white and all younger than him.

(4) Allen's prima facie case was contained in the allegations contained in his verified complaints. Those allegations included:

A. He is a member of the protected class, over 40 years of age and a member of a protected racial minority.

B. He was employed in the position and performing all functions required in a satisfactory or better fashion. He was thus qualified for the position.

C. He was replaced by a person, white, who

is younger than himself.

D. The Plaintiff was adversely affected in being denied continuation of his position and denial of supplemental pension benefits.

E. Plaintiff was more qualified by reason of his experience and tenure than the younger person employed.

Without answering his complaints the Respondents moved to dismiss pursuant to F. R. Civ. P 12(b)(1) and 12 (b)(6) alleging inter alia, that the Court had no jurisdiction because of the purported "separate entity" of RLEA and that the unincorporated committee had less than 15 employees, the minimum to invoke Title VII jurisdiction.

Allen concedes that the number of employees of the committee was less than 15, but contends that as a matter of operating function, RLEA is a "labor organization" with utterly no other

function than to serve as agent of the unions in lobbying and collective bargaining, is unincorporated and subject to complete control by the unions through the executive committee, and merely an arm of the unions for all purposes. As a matter of the weight of the evidence, Allen should and did know this for a fact, for he worked there 23 years and kept the books for much of that period, particularly the later years. As bookkeeper, he was privy to all financial transaction of RLEA and fully aware of its organizational structure, and who had the power to do what.

The United States District Court, relying primarily upon its lack of jurisdiction by reason of the small number of RLEA employees, dismissed both cases with prejudice. Allen's motion for reconsideration was denied. Allen appealed and the United States Court of Appeals for

the District of Columbia Circuit affirmed.

That later Court erroneously stated that Allen had submitted no evidence in support of his contention that RLEA was merely an arm of the unions. That Court apparently overlooked the affidavits of record verifying all factual statements and treated the factual determination, prior to any discovery and before any answer was required, as if a trial had occurred. Of course, no trial had occurred, the Defendant Unions never were required to even answer the complaints, nor had Allen any need to conduct discovery. He knew all of the alleged facts, and he contends it was entirely improper to require him to prove his entire case upon a motion to dismiss. Thus, the procedure followed is utterly contrary to the entire scheme of the federal rules of civil procedure.

All facts alleged in Allen's complaints were verified by Allen's

affidavits, and he knew of his own knowledge, which was so stated in his affidavit by reason of his knowledge as bookkeeper for RLEA and financial manager of the bank accounts, that RLEA had no independent existence or function except to serve the unions.

Allen contends that both Courts below have failed to recognize the self-evident non-existence of any real or bona-fide separate entity or function of RLEA. His verified complaints say so, his affidavits say so, his 23 years of experience knows so. He so alleged. As a consequence the unions were never even required to answer his allegations and escaped without even the evidentiary hearing requested on the question of jurisdiction. The United States Court of Appeals for the District of Columbia Circuit apparently thought that Allen should have entered into discovery to (somehow) gather more proof -- of his known

to be true and sworn allegations, but Allen, recently fired, and left utterly without funds because of the discriminatory firing, could not afford that luxury. Moreover, until his charges were answered, he knew all he had to know to submit and prove, via his testimony, based upon personal knowledge, a prima facie case of Title VII discrimination as well as age discrimination. Allen contends the procedure followed by both Courts below violates the standards set by this Court for the burden of proceeding in a discrimination case once a prima facie case has been alleged[1]/,

STATEMENT OF FACTS:

The Petitioner, James A. Allen (Allen) was employed for twenty three (23) years by the Railway Labor Executives Association

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[1]/ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973) and its legion of progeny.

(RLEA). RLEA is an unincorporated committee formed by seventeen (17) large labor unions. Each union was entitled by agreement to one member of the executive committee of RLEA. The executive committee voted on all activities undertaken by RLEA. The main function of RLEA over the 23 year period of Allen's employment were lobbying and collective bargaining for the member unions. The RLEA had no other function other than to serve its member unions. It had no other contributors other than its members.

Over the relevant period, RLEA never had more than 15 employees. James A. Allen started as a printer, gained considerable skill and knowledge of the business of the committee. By reason of experience, intelligence, perseverance and hard work he advanced in function and duties assigned to him (but not status). Allen became the bookkeeper and financial manager of all

operations. He trained many employees in the intricacies of the operation on behalf of the unions executives. He even trained those white employees who eventually replaced him. Early on he was told he could never advance in status because of his race. That representation remained true for the entire term of his employment despite his increased duties.

Finally a vacancy occurred in the chief executives position (a position elected by the committee). Allen applied for that position. He was summarily fired, he contends, for applying for the position when he was a negro.

Other persons, all white, all with less experience and expertise than Allen and all younger than Allen were retained. Allen's jobs were parceled out among those remaining committee employees.

The Respondents argued successfully that RLEA was a separate economic entity,

relying on the fact that it had its own payroll system (for the eight employees) and its own IRS identification number.

Mr. Allen contends that there never was any separate legal entity of RLEA, RLEA has no separate economic viability except for work for the unions and money received from those unions, and in addition, the civil rights act of 1991 specifically created jurisdiction in the Federal Courts over "labor organizations", of which RLEA and the seventeen controlling unions are such "labor organizations", obviously, by definition. For these reasons the Petition for Certiorari should be granted.

SUMMARY OF ARGUMENT FOR GRANTING CERTIORARI:

The Railway Labor Executives Association (RLEA), an unincorporated committee which served as the lobbying and collective bargaining arm of seventeen major labor unions, and had no other independent function, and was totally

controlled in all material and policy respects by its union head committee executive committee, in no way should be considered, for purposes of counting employees, as an independent economic unit such that it evades the operative effect of the anti-discrimination laws. The RLEA had no reason to exist except to serve as collective bargaining agent and lobbying arm of its principals, the member unions. Moreover, the civil rights act of 1991[2]/ specifically names "labor organizations" as covered employers.

Allen, contrary to the holding of the United States Court of Appeals for the District of Columbia Circuit, furnished in verified complaints, affidavits, and documents, sufficient proof to withstand a motion, pursuant to F.R.Civ. P. 12 (b)(1) and 12 (b)(6), to dismiss <u>before</u> answer,

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[2]/ § 701 (n) of the Civil Rights Act of 1964, (as amended).

before any discovery, and without the requested hearing, that in fact the RLEA was not an independent economic entity for purposes of counting employees pursuant to Title VII, which requires 15 employees to invoke the jurisdiction of the federal courts, and further, RLEA was a "labor organization" pursuant to the jurisdictional definitions of the Civil Rights act of 1991.

This erroneous interpretation of the jurisdictional provisions of Title VII flies in the face of existing case law which requires a bona-fide separate economic entity for the purposes of counting number of employees, which RLEA is not, being wholly dependent on its union memberships for support, and results in an evasion of the purposes of Title VII, all of which is contrary to the express intent of Congress to cover "labor organizations" by the anti-discrimination laws as

contained in the Civil Rights act of 1991.

ARGUMENT FOR ALLOWING THE WRIT:

I. Allen, an african american employee of an eight (8) employee unincorporated committee, which was created by and exclusively exists for no reason except to perform lobbying, collective bargaining and other functions for seventeen (17) major railway labor unions, may invoke the jurisdiction of the Federal Court under Title VII:

CRITICAL FACTUAL DETERMINATIONS:

The District Court made three critical factual determinations which led to the result in this case. Those determinations resulted in the holding that jurisdiction did not exist. The determinations were made at the very beginning of the case, without requiring an answer to the complaint(s), in the total absence of discovery, without any hearing which was requested, and ignored the evidence of

record submitted by Allen[3]/, based on his personal knowledge and observations over 23 years of employment in favor of self-serving declarations of some of the union executives. The critical determinations which were clearly erroneous were:

1. The RLEA is not a separate economic entity from the unions or the executive committee running RLEA, and that therefore it did have the requisite number of employees.

2. That RLEA is in fact a "labor organization" within the purview of the Civil Rights Act of 1964 § 701, (new subsection (n).

3. That the RLEA was indeed at all times and for all purposes the Agent of the

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[3]/ Allen's "evidence" consisted, in the total absence of discovery or any discovery schedule set by the Court, of his verified complaints and two affidavits (one of which verified all facts in the complaint), and which refuted the primary allegations made in Defendants' motions to dismiss under F.R.Civ. P. 12(b)(1) and 12(b)(6).

unions.

The Court below never had an evidentiary hearing any of these subjects, nor was Allen allowed the time or opportunity to develop counter-vailing evidence as to these three factual matters. How indeed could he counter these arguments before the denials were even made. The granting of a 12 (b)(1) motion under these circumstances simply makes no sense.

THE NUMBER OF EMPLOYEES, IF COUNTED CORRECTLY, EXCEEDS 15:

Case law on the subject of counting the number of employees supports Allen's view that the small number of employees (8) of the committee is irrelevant to the basic issue. The correct issue is whether the committee (made up of the union heads) exercised control over the RLEA employees. In fact they did, as Allen's affidavit and pleadings demonstrate. These facts were never even considered by the Courts below although argued by Allen in his briefs.

Case Law on Number of Employees:

The "true employers" were the unions who jointly benefited from the acts of the RLEA employees under the control of the executive committee composed of union heads. An employer may not avoid Title VII liability by delegating its discriminatory programs to a third party (here its "Committee" RLEA). Terbovitz v. Fiscal Court of Adair County, Ky, 825 F.2d. 111 (6th Cir. 1987). See, also Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986); Webb v. Missouri Pacific R. Co., 826 F.Supp. 1192 (E.D. Ark. 1993).

In determining whether the parent unions and the committee are a "single employer" for purposes of Title VII, the appropriate standard is whether, upon review of the circumstances of the ownership relationship, the owner exercised a degree of control that exceeded that control normally exercised by a parent

corporation which is separate and distinct from the subsidiary (corporate) entity-not applicable here), and, when sufficient control is found--all of the entities--may be given single employer status so their combined number of employees will be determinative of whether they are subject to the requirements of Title VII. Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Bonilla v. Liquilux Gas Corp., 812 F.Supp. 286 (D. PR 1993); Magnusan v. Peak Technical Services, Inc., 808 F.Supp. 500 (E.D.Va. 1992).

Here, 17 union organizations combined to put up the money to jointly hire Allen. The unions had a management and financial interrelationship with the RLEA employees. They had interrelated operations, common management, centralized control of labor relations and common ownership. These factors completely justify the 15 person requirement of Title VII. Whiles v. Houn,

699 F.Supp. 206 (E.D. Mo. 1988); EEOC v. Alford, 142 F.R.D. 283 (ED. Va. 1992).

RLEA IS AN AGENT OF THE UNIONS:

Even assuming arguendo RLEA is not otherwise an employer for purposes of Title VII and ADEA, it (and the unions) are nevertheless subject to Title VII and/or ADEA jurisdiction of the Federal courts as an "agent" of the labor unions:

In this case the whole function of RLEA was to act as agent for its member labor organizations. it was a jointly controlled "arm" of each of the unions and admittedly conducted litigation, lobbying, collective bargaining and published a newspaper. It was unincorporated. All of its board members represented "the employer", i.e., management for all purposes. RLEA's executive director and the committee chairman and vice chairmen were elected by the full committee. Effectively all management decisions were

made by the full committee.

Why then under these circumstances, is the four person office staff a "separate entity"? Merely because it had a separate IRS ID number and wrote its own payroll checks. Allen submits that this is not the test. In fact, each employee of RLEA worked as the agent for each of its member unions.

Under these circumstances the employer is not the phantom entity RLEA, but the real employers for whom all office staff worked as agents. Shager v. Upjohn Co., 913 F.2d 398, (7th Cir. 1990); Wasilchuk v. Harvey's Wagon Wheel, Inc., 610 F.Supp. 206 (D.C. Nev. 1985) (ADEA cases).

The same principle applies under Title VII. Where the individual (RLEA) operates as the alter ego of the employer (the unions), the employer is liable for unlawful employment practices of the individual. Sauers v. Salt Lake County, 1

F. 3rd 1122 (10th Cir. 1993); Terbovitz, supra; Shepherdson v. Local Union No. 401 of Intern. Ass'n. of Bridge Structural and Ornamental Ironworkers, 823 F.Supp. 1245 (E.D. Pa. 1993).

RLEA IS A "LABOR ORGANIZATION":

The interrelated control and the fact that each and every one of the members of the committee are the chief executive officer of one of the member unions, coupled with the fact that the entire purpose of the unincorporated committee that is RLEA was to serve as the lobbying arm and collective bargaining arm of the unions, by definition, makes it a "labor organization" or at least the agent of those unions composing the executive committee serving the unions.

By the very provisions of Title VII, as now amended by the Civil Rights Act of 1991, jurisdiction over this type of organization lies in the Federal Courts.

For this reason, standing alone, Certiorari should be granted.

II. The verified pleadings and affidavits of the Plaintiff, the former bookkeeper of the committee which is RLEA, who well knew of his own personal knowledge based upon observation over 23 years, the organizational structure and operations of the committee, furnished sufficient "evidence" of the non-existence of a separate "entity" for the committee, and that it was merely the agent or an arm of the unions, to withstand a F.R.Civ. P. 12 (b)(1), or a 12 (b)(6) motion to dismiss on the afore-stated grounds, respectively, lack of jurisdiction, and failure to state a claim, before any answer by the unions and before any discovery:

In fact the assertions that RLEA is an independent economic entity are absurd. The result in this case is therefore

contrary to Federal Law and the burdens of proof and proceeding established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973).

CONCLUSION:

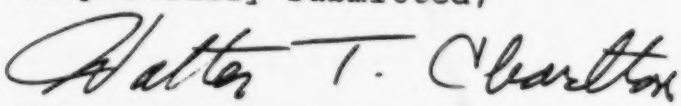
The committee and the unions it represents are not exempt from Title VII because the committee, as a factual determination for which there was never an evidentiary hearing as to whether the "employer" is not a legally cognizable "separate entity" having an insufficient number of employees to invoke the jurisdiction of the Federal Courts. The so called "Evidence" relied upon by the Courts below, the fact of a payroll system and an IRS number in the name of the Committee are not determinative.

Further, it is the "Agent" for purposes of lobbying and collective bargaining, and also is a "labor organization" and as such is subject to the

expanded jurisdiction of the Federal Courts as contained in the Civil Rights Act of 1991.

For all of the foregoing reasons, the petition is important to a continued application of the principles established by this Honorable Court which would be, as a practical matter evaded by the denial of this petition contrary to the interests of justice and civil rights in these United States.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7076 & 93-7077 September Term 1994

James A. Allen 92cv0076
v. Filed Dec. 08, 1994
Edward P. McEntee, et al.

Appeals from an Order of the United States District Court for the District of Columbia

Before: SENTELLE, HENDERSON, and TATEL, Circuit Judges.

JUDGMENT

These appeals were considered on the record from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the decision of the district court be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven

petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam
For the Court:

Ron Garvin, Clerk

MEMORANDUM

Appellant challenges a decision of the district court dismissing for lack of jurisdiction his claim that appellee RLEA discharged him from his employment in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq. (1988)(ADEA), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. (1988) (Title VII). We agree with the district court.

A federal district court has subject matter jurisdiction to hear a discrimination claim under the ADEA if the defendant employs at least twenty persons. See 29 U.S.C. § 630(b). Similarly, for an action to stand under Title VII, the defendant must employ at least fifteen persons. See 29 U.S.C. § 2000e(b).

Appellant concedes his employer, the

Railway Labor Executives' Association (RLEA), does not employ the requisite number of persons to be covered as an employer under either the ADEA or Title VII. Nevertheless, he asserts the RLEA and the labor organizations for which its members serve as chief executives are an integrated enterprise. As a result, appellant alleges those persons employed by these organizations count in satisfying the numerical requirements of both these statutes. Alternatively, appellant contends the RLEA is an agent of the labor organizations for purposes of satisfying the statutes' numerical requirements.

We reject both assertions. Appellant has supplied not a strand of evidence supporting his position on either count. With regard to his integrated enterprise theory, appellant merely provides conclusory statements embodying the factors courts use to determine if a single

employer actually exists. See Armbruster v. Quinn, 711 F.2d 1322, 1337 (6th Cir. 1983) (applying a four-part test to determine whether a single entity exists). Similarly, appellant has failed to supply any evidence the RLEA is the agent of the labor organizations with respect to their employment practices. See Deal v. State Farm County Mut. Ins. Co. of Texas, 5 F.3d 117, 199 (5th Cir. 1993) (holding an agent under Title VII and the ADEA must be an agent with respect to employment practices and decisions).

Contrary to appellant's position, we find the district court properly adhered to the standards governing a motion to dismiss for lack of subject matter jurisdiction. Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). The court properly considered evidence presented by appellees supporting their motion to dismiss. Appellant provided no

evidence in rebuttal. Nor did appellant seek discovery or request the court to hold appellees' motion to dismiss in abeyance to allow him time to conduct discovery.

Finally, the lower court correctly found the Labor Cooperative Educational and Publishing Society was not appellant's employer. We adopt the lower court's reasoning. This issue merits no further discussion.

For the foregoing reasons, we affirm the district court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ALLEN, Plaintiff, v. EDWARD P. McENTEE, Chairman, Railway Labor Executives Association, et al., Defendants.	)	Civ. Action No. 92-0776 (RCL)
JAMES ALLEN, Plaintiff, v. EDWARD P. McENTEE, Chairman, Railway Labor Executives Association, et al., Defendants.	)	Civ. Action No. 92-2151 (RCL)

ORDER

These two related cases come before the court on several different motions.

For the reasons stated in the accompanying Memorandum Opinion issued this date, it is hereby ORDERED that:

1. The court GRANTS defendants' motions to consolidate plaintiff's two cases, and those cases are hereby CONSOLIDATED pursuant to Fed. R. Civ. P. 41(a).

2. The court GRANTS all defendants' motions to dismiss, and plaintiff's two cases are hereby DISMISSED WITH PREJUDICE for the following reasons:

a. The court dismisses plaintiff's Title VII and ADEA claims pursuant to Fed. R. Civ. P. 12(b)(1) because it the RLEA was plaintiff's only employer and the court lacks subject matter jurisdiction over the RLEA.

b. The court dismisses plaintiff's section 1981 claim pursuant to Fed. R. Civ. P. 12(b)(6) because that claim fails to state a claim upon which relief may be granted.

c. The court dismisses plaintiff's D.C. Human Rights Act claim pursuant to 28 U.S.C. § 1367(c)(3) because the court no longer has jurisdiction over this claim after dismissing all claims over which it had original jurisdiction.

3. Plaintiff's motion for a default

judgment against the defendant LCEPS is DENIED.

4. Plaintiff's two motions for leave to amend this complaint in Action No. 92-776 are DENIED.

5. Plaintiff's motion to prohibit ex parte communications and to strike those communications from the record is DENIED.

6. Defendants' motion for sanctions is DENIED.

7. Defendants' 6/26/92 motion for an extension to 7/8/92 to file their opposition to plaintiff's motion for leave to file an amended complaint is GRANTED nunc pro tunc.

SO ORDERED

/s/
Royce C. Lamberth
United States District Judge

DATE: Apr. 2, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ALLEN, Plaintiff, v. EDWARD P. McENTEE, Chairman, Railway Labor Executives Association, et al., Defendants.	)	Civ. Action No. 92-0776 (RCL)
JAMES ALLEN, Plaintiff, v. EDWARD P. McENTEE, Chairman, Railway Labor Executives Association, et al., Defendants.	)	Civ. Action No. 92-2151 (RCL)

MEMORANDUM OPINION

These two related cases come before the court on nine different motions. The court issues this Memorandum Opinion in both cases because the court consolidates them for the reasons stated in this Opinion.

In action number 92-776, the motions currently pending are: (1) all seventeen defendants/ motions to dismiss or for summary judgment, (2) plaintiff's two

distinct motions for leave to file an amended complaint, (3) plaintiff's application for a default judgment against defendant Labor Cooperative Educational and Publishing Society, (4) a motion by almost all defendants for sanctions against plaintiff, (5) defendants' motion to consolidate this case with Civil Action No. 92-2151, and (6) plaintiff's motion to prohibit ex parte communications and to strike those communications from the record.

In action number 92-2151, the motions currently pending are: (1) defendants' motion to consolidate this case with action number 92-776, (2) defendants Peterpaul, Scardelitti, and Labor Cooperative Educational and Publishing Society' motions to dismiss or for summary judgment, and (3) plaintiff's motion to prohibit ex parte communications and to strike those communications from the record.

As is readily apparent, there are duplicative motions pending between these two cases. The near identity of facts and issues present in these two cases is the cause. For this reason, the court grants defendants' motion to consolidate these two cases and considers the duplicative motions together and applies them equally to each case.

The court will address each of the motions in turn. For the reasons stated below, the court grants the RLEA members' motion to dismiss and accordingly dismisses in their entirety both the plaintiff's cases. Accordingly, the court denies plaintiff's motion for a default judgment against the defendant Labor Cooperative as well as plaintiff's motion for leave to amend. Lastly, the court denies defendants' motions for sanctions, and grants plaintiff's motion to strike.

I. FACTUAL BACKGROUND.

Plaintiff James A. Allen is an African-American male who is over forty years old. From 1964 until September 30, 1991, plaintiff was employed by the Railway Labor Executive Association (RLEA). During that time, Mr. Allen's main duty was to run the RLEA's printing presses and photocopier. For a brief period, Mr. Allen also assumed the bookkeeping responsibilities of the RLEA.

The RLEA is a nonprofit unincorporated association comprised of the chief executives of a number of railway labor organizations. The RLEA functions as a coordinating and policymaking body for legislative and other matters of importance to railway workers, including issues pending before government agencies. At all relevant times the RLEA employed less than fifteen employees. In September 1991, when RLEA discharged Mr. Allen, RLEA employed three employees: two secretaries and Mr.

Allen. The RLEA also contracted with an independent consultant on a part-time basis.

Mr. Allen brought action number 92-776 on March 30, 1992. In his complaint, Mr. Allen contends that defendants discriminatorily denied him equal pay and then discharged him from his employment in violation of 29 U.S.C. § 621 (Age Discrimination in Employment Act "ADEA"), 42 U.S.C. § 1981 ("section 1981"), and 42 U.S.C. § 2000e ("Title VII"). Mr. Allen brought his claim against each former and current member of the RLEA, that is each chief executive who participates in the RLEA. Mr. Allen also sued the Executive Secretary-Treasurer of the RLEA, who was his immediate supervisor, and the Labor Cooperative Education and Publishing Society ("LCEPS"). Mr. Allen sued the LCEPS even though it was never his legal employer because he contends he did work

for them at the direction of his supervisor.

After Mr. Allen filed action number 92-776, the motions listed above were filed. One of the bases for the motions to dismiss was Mr. Allen's failure to exhaust his administrative remedies before filing his ADEA and Title VII claims. Mr. Allen subsequently exhausted those remedies and proceeded to file a new complaint which simply repeated all the allegations of the former complaint but then added his compliance with the applicable exhaustion requirements.[1] That second complaint initiated action number 92-2151. More motions, nearly identical to those in action number 92-776, were filed in action number 92-2151. Defendants also filed a motion to consolidate the two actions.

The court now addresses the motions

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[1]Mr. Allen also for the first time asserted a cause of action under the D.C. Human Rights Act.

filed in these two cases. The court does so in the following order: (1) defendants' motion to consolidate, (2) defendants' motions to dismiss, (3) plaintiff's motion for a default judgment, (4) plaintiff's motion for leave to amend, (5) plaintiff's motion to strike, and (6) defendants' motion for sanctions.

II. DEFENDANTS' MOTIONS TO CONSOLIDATE.

Plaintiff filed his complaint in action number 92-776 without having first exhausted his administrative remedies for his Title VII and ADEA claims. Action No. 92-776 Complaint ¶ 4.[2] Defendants moved for dismissal of those two claims on that ground. RLEA Motion to Dismiss at 5. Plaintiff then filed administrative complaints for his Title VII and ADEA claims and exhausted the administrative remedies available. Having done so,

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[2]Unless otherwise indicated, "Complaint" refers to plaintiff's complaint in Action No. 92-776.

plaintiff then filed action number 92-2251.[sic] The complaint in that action was nearly identical to that in action number 92-776, except that the new complaint alleged that plaintiff had exhausted his administrative remedies. 92-2151 Complaint ¶ 1.

Upon plaintiff's filing of action number 92-2151, almost all of the defendants moved to consolidate plaintiff's two actions.[3] The defendants simultaneously moved to have the court consider all motions filed in action number 92-776 also in action 92-2151. Plaintiff does not object to consolidation of the two cases, except in one respect. Plaintiff's only condition on his concession of the motion is that defendants' exhaustion of remedies argument not be made applicable to action number 92-2251[sic], because for

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[3]The RLEA members, former Executive Secretary-Treasurer Kennedy, the LCEPS, and defendant Leitz all moved to consolidate.

that action plaintiff did exhaust his remedies.

Under Fed. R. Civ. P. 42(a), the court may consolidate two cases if between them there exists "a common question of law or fact." The near identity of the complaints in these two actions provides ample basis for consolidation. The court grants defendants' motions to consolidate but does not address plaintiff's request regarding the exhaustion of remedies argument, because the court ultimately dismisses plaintiff's two cases on other than exhaustion of remedies grounds. When addressing the motions that remain to be resolved, the court considers all motions as applicable to both actions. The court now addresses defendants' motions for dismissal and summary judgment.

III. MOTIONS FOR DISMISSAL AND SUMMARY JUDGMENT

Defendants, in various groupings, all have filed for the dismissal of, or in the

alterative, for summary judgment on plaintiff's complaints. The court concerns itself only with the motions of the RLEA members ("RLEA Motion") and the LCEPS ("LCEPS"), because those motions alone justify dismissal of plaintiff's cases as to all defendants.[4] The court addresses plaintiff's Title VII and ADEA claims first. Then the court turns to plaintiff's section 1981 claim and D.C. Human Rights Act claim.

A. Title VII and ADEA claims.

The RLEA member defendants move to dismiss plaintiff's Title VII and ADEA claims on the ground that the RLEA is not an employer as defined by those statutes and thus not subject to claims brought under them. The court agrees and dismisses plaintiff's Title VII and ADEA claims.

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[4]Defendants Michael Sacco and George Leitz's motions to dismiss incorporated the arguments made by the RLEA members. Sacco Motion at 1, Leitz Motion at 1.

Under Fed. R. Civ. P. 12(b)(1), this court can dismiss a claim over which it lacks subject matter jurisdiction. Defendants move to dismiss under this provision because it is their contention that the court lacks jurisdiction over the RLEA because it is not an "employer" under the relevant statutes. For purposes of deciding this motion, the court must assume that the allegations plaintiff makes in his complaints are true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person. . . ." 42 U.S.C. § 2000e(b). The ADEA defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each

working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b). The RLEA member defendants contend that the RLEA never employed fifteen employees, needless to say twenty, at any relevant time and is not subject to the strictures of either of these statutes. The court agrees.

The economic realities of plaintiff's employment demonstrate that the RLEA was his employer. Plaintiff received his salary from the RLEA and the RLEA was responsible for reporting that income to the state and federal governments. Complaint ¶ 8, see also RLEA Motion Exh. 1 ("McEntee Declaration") Attachment C. The RLEA also was the entity that signed a collective bargaining agreement with plaintiff's union and paid monies into the union's pension fund on plaintiff's behalf. RLEA Motion Exh. 2 ("Kennedy Declaration")

at ¶ 4. The RLEA was responsible for providing plaintiff with paid holidays, sick leave, and vacation days. Kennedy Declaration at ¶ 4. Finally, plaintiff received instructions regarding his work from the Executive Secretary-Treasurer of the RLEA, James J. Kennedy. Complaint ¶ 8. These factors demonstrate that the RLEA was plaintiff's employer. See Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979((under Title VII employer-employee relationship determined by economic realities of that relationship).[5]

The RLEA historically has had a very small staff. Between July 1987 and September 30, 1991, the RLEA employed no more than seven employees at any one time, including its part-time consultant. Kennedy Declaration at ¶¶ 3, 5-6. At the

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[5]The same cannot be said for either of the alternative employers plaintiff proposes, LCEPS or the member unions, as discussed below.

time of Mr. Allen's discharge in September of 1991, the RLEA had three full-time employees--two secretarial staff members, both of whom were over 40 years old, and Mr. Allen. McEntee Declaration at ¶¶ 9, 12. Because the RLEA never employed fifteen or more employees, it is not subject to Title VII or the ADEA and the court lacks subject matter jurisdiction over these claims.

Plaintiff concedes that the RLEA, when considered in this way, does not constitute an "employer." Nevertheless, plaintiff contends he has a viable Title VII and ADEA claim. Plaintiff bases this position on his rather broad construction of the terms "employee" and "employer." Plaintiff first contends that the union representatives who comprised the RLEA, along with the member unions' employees, all were "employees" of the RLEA. Plaintiff alternatively concedes that the LCEPS and/or the member unions

also were his "employer." Plaintiff requests the court to accept these arguments so that plaintiff can piece together out of these various entities an employer who had at least fifteen employees. The court rejects both of plaintiff's positions.

First, the union representatives to the RLEA are not its employees. Neither Title VII nor the ADEA provides such guidance for determining who is an "employee" under these laws. Those statutes define that term simply as "an individual employed by an employer." 42 U.S.C. § 2000e(f), 29 U.S.C. § 630 (f).[6] As a result, in determining whether the RLEA members may be counted as employees, "the primary consideration [must be] whether an employer-employee relationship exists." Chavero v. Local 241, 787 F.2d

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[6]The ADEA definition states "any" employer.

1154, 1157 (7th Cir. 1986), citing Zimmerman v. North American signal Co., 704 F.2d 347, 352 n.4 (7th Cir. 1983).

Plaintiff has not offered any evidence to support this allegation that the RLEA members have an employment relationship with the RLEA or that they "perform traditional employee duties." Chavero, 787 F.2d at 1157. In fact, plaintiff has offered no evidence at all to support its allegation that the RLEA member representative are employees of the RLEA. A quick review of the representative's duties demonstrate that no such employment relationship exists.

The duties of the member representatives are quite simple and straightforward: each must attend monthly meetings (except for July and August) to discuss legislative and legal matters affecting railroad employees. Some members also have the responsibility of overseeing

the daily functions of the RLEA and its financial affairs. The member representatives are not on the payroll of the RLEA. In fact, the members must contribute a pro rata share toward the expenses of the RLEA. Moreover, the representatives do not receive their instructions from the RLEA. To the contrary, their responsibility is to implement through the RLEA the instructions given to them by their respective unions.

Directors, board members, and trustees have rules that are somewhat analogous to those held by the RLEA members, and those types of supervisors have been held not be employees, even when those individuals are paid for their services. See Zimmerman, 704 F.2d at 352 (two directors of company defendant not employees because "Congress did not intend the term 'employee' to include persons who are not more than directors of a corporation or unpaid,

inactive officers."); see also Chavero 787 F.2d at 1156 (executive board members who received compensation were not employees because they did not perform traditional employee duties). The same legal reasoning requires this court's conclusion that the RLEA members are not RLEA employees. No traditional employment relationship existed between the members and the RLEA, and in the absence of such a relationship, the court finds that the RLEA members do not count toward the RLEA's satisfaction of the "employer" definition. By implication then, the employees of the member unions also are not employees of the RLEA.

Next, plaintiff tries to finesse the "employer" definition by contending that the RLEA was not his sole employer. Plaintiff attempts to do so in two ways. Plaintiff contends that either the LCEPS should be counted as his employer because he performed work for it, or that the

RLEA's member unions should be treated as his employer(s) because the RLEA and unions work together so closely. If either LCEPs or the member unions constituted his employer(s), plaintiff claims the employees of those separate entities count toward the ultimate satisfaction of the "employer" definition. See Plaintiff's Opposition to Defendants' Motion for Summary Judgment at ¶ 4. The court rejects these arguments.

Plaintiff argues that the LCEPS was his employer because he performed five to ten per cent of his duties for LCEPS as part of his assigned tasks at the RLEA. Opposition to LCEPS Motion at ¶ 2, Opposition to RLEA Motion at ¶ 4(A). Plaintiff also contends that the LCEPS was his employer because the LCEPS is a de facto subsidiary of RLEA. Complaint at ¶ 7. Neither argument justifies treatment of the LCEPS as plaintiff's employer.

The court accepts as true plaintiff's

allegation that he spent five to ten per cent of his time working for the LCEPS. Nevertheless, RLEA's assignment of plaintiff to perform limited LCEPS tasks does not transform LCEPS into plaintiff's employer. Plaintiff did not receive his payroll from them, no did he report to LCEPS for the assignment of duties. For both he relied solely on RLEA. As plaintiff concedes, he received his all his work instructions from the Executive Secretary-Treasurer of the RLEA,, James Kennedy, Complaint at ¶ 8, not from any supervisor at LCEPS. Plaintiff's occasional delegation to LCEPS does not overcome the economic reality that RLEA controlled the conditions of his employment and was at all times his exclusive employer. Cf. Spirides, 613 F.2d at 831-32 (economic realities determine employee

status).[7]

The court also concludes that the LCEPS was not a subsidiary of the RLEA and therefore plaintiff's employer. Plaintiff offers no support for this theory. He offers only a statement to that effect in his Complaint, Complaint at ¶ 7, and the additional statement that the LCEPS is a "house organ for the unions and was their agent in dissemination of labor information through out all of the unions." Opposition to LCEPS Motion at ¶ 3. These statements only prove, if anything, that the LCEPS had a business relationship with the RLEA and its member unions. Such business

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[7]The fact that the LCEPS might have given plaintiff end of the year bonuses, Opposition to LCEPS Motion, Aff. of James A. Allen ¶ 8, reinforces rather than undermines the court's conclusion that the LCEPS was not plaintiff's employer. As plaintiff concedes, the LCEPS apparently gave plaintiff the bonuses as gifts precisely because it was not in a position otherwise to compensate him for the work he did. Id. RLEA, as plaintiffs's employer, had that exclusive obligation.

relationship in no way demonstrate that LCEPS should be treated as plaintiff's employer or explain why plaintiff thinks such treatment would be justified. Nor will the court expend its energies contriving such an explanation for plaintiff. As the court already has concluded, LCEPS was not plaintiff's employer and its employees do not count toward the RLEA's fulfillment of the "employer" definition.

Plaintiff next argues that the unions were his actual employer. Plaintiff basis this contention on two theories. First plaintiff argues that the RLEA is an "agent for legislation and collective bargaining for some of its member unions" and is therefore an agent of an employer with the requisite number of employees.[8] Opposition

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[8]Title VII holds liable the agent of an employer, as long as the employer meets the requisite definition, i.e. has at least fifteen employees. 42 U.S.C. § 2000e(b).

to RLEA Motion at ¶ 5(A). Second, plaintiff argues that the RLEA and its member unions were an integrated enterprise and that the integrated enterprise with all its employees was his employer.

Plaintiff relies on two cases for his argument that the RLEA is an agent of the member unions. The circumstances justifying that finding in those cases do not exist here. In EEOC v. Printing Industry of Metropolitan Washington, 26 Fair Empl. Prac. Cas. (BNA) 149, 151 (D.D.C. 1981), this court per Judge Richey decided that a labor association was the agent of its member unions, but only because the association represented its members in labor relations. This is not the case here where the RLEA does not represent its member unions in labor negotiations.[9]

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[9]Plaintiff's only support for his theory that the RLEA is the collective bargaining agent for its member unions is one self-serving phrase in a letter sent by John F. Peterpaul of the International

In Hallquist v. Max Fish Plumbing and Heating, 46 Fair Empl. Prac. Cas. (BNA) 1855, 1859 (D. Mass. 1987), the court found that the plaintiff's superintendent was an agent of the employer and thus that the employer could be held liable for the actions of the superintendent. This

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Association of Machinists and Aerospace Workers ("IAW") to the RLEA. In that letter Mr. Peterpaul justifies IAW's withdrawal from the RLEA on the basis that RLEA's purpose "has changed to that of being deeply involved in legal matters and collective bargaining." Opposition to RLEA Motion, Attachment A. This statement alone does not support the conclusion that the RLEA is the collective bargaining agent of its member unions. Such a conclusion is further undermined by the fact that the RLEA's name is conspicuously absent from the list of collective bargaining agents involved in railroad dispute resolution proceedings overseen by the President of the United States. See RLEA Reply Memorandum, Exhs. 3, 4 (Reports to President by Emergency Boards 219 and 220 regarding resolution of railway labor disputes). Listed instead are the names of some of the RLEA member unions involved. If the RLEA was the members' collective bargaining agent, its name, rather than its members', would have been present on that list. The RLEA acts as the mouthpiece of its union members for legislative and legal affairs. It is not their collective bargaining agent.

holding in no way supports plaintiff's theory that RLEA was the agent of its member unions.

The agency theory of liability in general has been used by the courts, like in Hallquist, only as means of holding liable supervisory or managerial employees to whom employment decisions have been delegated by their employer. York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982). Neither the theory nor the case law interpreting the theory "support the plaintiff's assertion that the association can be an agent of its active members and thereby regarded as a employer" of fifteen or twenty or more employees. Id.

Plaintiff's next theory is that the RLEA and its member unions operated as an integrated enterprise so that the employees of the entire enterprise must be counted toward RLEA's satisfaction of the

"employer" definition. The sole case plaintiff relies upon for this theory is Williams v. New Orleans Steamship Ass'n, 341 F.Supp. 613 (E.D. La. 1972). In that case the court concluded that the New Orleans Steamship Association and its company and union members comprised an integrated enterprise to be treated as a single employer for Title VII purposes. Id. at 616. The court reached the conclusion that an integrated enterprise existed because the Association established uniform hiring and employment policies for its member companies and operated a central hiring hall for its member unions. Plaintiff does not and could not contend that the RLEA exercises this type of control over its member union's policies.

From Williams, courts have created four factors that determine whether or not a trade association and its members constitute an integrated enterprise. Those

factors are:

(1) Interrelation of operations, i.e. common officers, common record keeping, shared bank accounts and equipment.

(2) Common management, common directors and boards.

(3) Centralized control of labor relations and personnel.

(4) Common ownership and financial control.

See EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 571-71 (6th Cir. 1984); York, 684 F.2d at 362; Baker v. Stuart Broadcasting, 560 F.2d 389, 392 (8th Cir. 1977). These four factors clearly are not evident here. RLEA is a separate legal entity from its member unions. The members of RLEA are separately organized and managed. There is no centralized control of labor relations by RLEA. Finally, their

is not common ownership of control.[10] See York, 684 F.2d at 362-363 (finding for these same reasons that a similar trade association was not an integrated entity); accord Childs v. Local 18, Int'l Bhd. of Elec. Workers, 719 F.2d 1379, 1382 (9th Cir. 1983). (local branch of union not integrated with parent entity because local union conducted own labor relations, hiring/firing, officer elections, collective bargaining, and had own treasury.) The court concludes RLEA is not integrated entity with its members.

Because the RLEA employed less than fifteen employees and was plaintiff's sole employer, the RLEA was not an employer within the meaning of Title VII and the ADEA. Accordingly, the court does not have subject matter jurisdiction over those

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[10]The member associations do provide monetary support for the RLEA, but that does not prove the RLEA is a sham organization operating at the pleasure of its members.

claims and they are dismissed under Fed. R. Civ. P. 12(b)(1).

Those claims also are dismissed as to the other defendants in this case.[11] The court has concluded that plaintiff's only employer was the RLEA. Accordingly, the motion to dismiss of the LCEPS is granted because it was never the employer of plaintiff. The motion to dismiss of defendants Scardelitti and Peterpaul, and the motion of defendant Kennedy also are granted because these individuals were members or executives of the RLEA, respectively, and the RLEA's exclusion from Title VII and the ADEA likewise excludes these individuals from liability.[12] See Motion of Scardelitti and Peterpaul at 1,

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[11]As already noted, defendants Sacco and Leitz joined in the arguments of the RLEA members. See supra note 4.

[12]The court grants these defendants' motions to dismiss even though these defendants did not make the "employer" argument.

Motion of Kennedy at 2.

B. Section 1981 Claim.

Plaintiff also brings his termination claim under 42 U.S.C. § 1981. Section 1981 does not require the employer at issue to have any requisite number of employees, so that obstacle does not apply to this claim. Nevertheless, plaintiff's section 1981 claim suffers from another defect.

Section 1981 guarantees all people the right "to make and enforce contracts." That right is limited by those terms. That is, section 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989). More specifically, section 1981 does not apply to contract termination claims, like that which plaintiff now asserts. See Gersman v. Group Health Ass'n, 931 F.2d 1565, 1571

(D.C. Cir. 1991).

Plaintiff tries to get around this rule, as pronounced in Gersman, by arguing that the Civil Rights Act of 1991, which amended section 1981 to cover termination claims, applies retroactively to plaintiff's claim. Plaintiff's termination by RLEA was effective as of September 30, 1991. The Civil Rights Act became law in November of 1991. Plaintiff, then, can bring his termination claim under section 1981 only if the Act applies retroactively.

After the Circuit Court initially decided in Gersman that section 1981 did not cover termination claims, the Supreme Court remanded the case for reconsideration in light of the Civil Rights Act of 1991, 112 S.Ct. 960 (1990), in effect ordering the Circuit Court to determine whether section 101 of the Act, which expanded the coverage of section 1981, was retroactive and applied to the pre-Act termination

claims at issue in that case. In Gersman v. Group Health Ass'n, 975 F.2d 886, 889 (D.C. Cir 1992), the Circuit Court concluded that section 101 did not apply retroactively, and that, consequently, pre-Act termination claims could not be brought under section 1981. Under Gersman, plaintiff's termination claim is not cognizable under section 1981 and must be dismissed for its failure to state a claim.[13] Because this claim is not cognizable, the court dismisses the section 1981 claims as to all defendants even though all did not raise this specific argument in their motions.[14]

C. D.C. Human Rights Act Claims.

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[13] Any working condition claims plaintiff might assert under section 1981 also would be dismissed because those claims also are not cognizable under a pre-Act section 1981. See Patterson, 491 U.S. at 179-80.

[14] The RLEA members, Michael Sacco, and George Leitz, made this argument, but the LCEPS, James Kennedy, Robert Scardelitti, and John Peterpaul did not.

In his complaint in action number 92-2151, plaintiff for the first time asserts a cause of action under the District of Columbia Human Rights Act. Action No. 92-2151 Complaint ¶ 2. Defendants did not address this claim in their motions. Nevertheless, the court dismisses plaintiff's pendent D.C. Human Rights Act claim because the court has dismissed all claims of plaintiff over which the court could assert original jurisdiction. See 28 U.S.C. § 1367(c)(3). The court will not retain jurisdiction over plaintiff's state claim after dismissing the federal claim which formed the basis of this court's jurisdiction over that pendent action.

For the reasons stated above, the court dismisses the entirety of plaintiff's two cases. The court dismisses plaintiff's Title VII and ADEA claims because the court lacks subject matter jurisdiction over those claims. The court dismisses

plaintiff's section 1981 claims because that claim fails to state a claim upon which relief may be granted. Finally, the court dismisses plaintiff's D.C. Human Rights Act claim for lack of jurisdiction.

IV. MOTION FOR DEFAULT JUDGMENT.

Plaintiff moved for a default judgment against the defendant LCEPS because the LCEPS filed a motion for summary judgment before answering either of plaintiff's complaints. Under Fed. R. Civ. P. 56(b), a defendant's motion for summary judgment may be filed "at any time." This phrase allowed LCEPS to file their motions before pleading to plaintiff's complaint and tolled the time in which LCEPS had to file an answer. 6 Jeremy C. Moore et al., Moore's Federal Practice ¶ 56.08 (2d ed. 1985). The propriety of the LCEP's actions is reinforced by the fact that Rule 12(b)(6) motions to dismiss, which are analogous to motions for summary judgment,

must be filed before a defendant's answer. Fed. R. Civ. P. 12(b). The court denies plaintiff's motion for entry of a default judgment against defendant LCEPS.

V. PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS INITIAL COMPLAINT.

Plaintiff moved on two separate occasions for leave to amend his complaint in Action No. 92-776. In his first motion for leave to amend, plaintiff requested leave to amend for two reasons: (1) so that he could add his exhaustion of his administrative remedies, and (2) so that he could distinguish his termination claim from his claim of "on-going" discrimination. Motion for Leave to Amend at 1-2. In his second motion for leave to amend, plaintiff requested leave again for two reasons: (1) so that he could plead his receipt of a right to sue letter from the EEOC, and (2) so that he could allege facts relating to the agency relationship between

RLEA and its member unions. Second Motion for Leave to Amend at 1.

The court denies plaintiff's two motions as futile. A court may deny a party leave to amend if the proposed amendments would serve no purpose. Foman v. Davis, 371 U.S. 178, 182 (1962). See also Gaubert v. Federal Home Loan Bank Board, 863 F.2d 59, 69 (D.C. Cir. 1988) (court can deny leave to amend if amendments would serve no purpose). Here, plaintiff's first motion seeks amendments that would state his exhaustion of remedies and distinguish his claims. Such amendments would not have provided this court with subject matter jurisdiction over plaintiff's Title VII and ADEA claims. Nor would they have made section 1981 applicable to plaintiff's claims.

Plaintiff's second motion also seeks futile amendments. Again, the first reason for the motion was plaintiff's desire to

plead his receipt of a right to sue letter. Such an amendment would not have saved plaintiff's Title Vii or ADEA claims. Plaintiff's second desired amendment seeks to detail the relations between the RLEA, its member unions, and the LCEPS. That amendment also would have failed to save plaintiff's action. The factual averments plaintiff seeks to add to his complaint were also recounted in his opposition to the defendants' motions to dismiss, i.e. that RLEA and its unions were an integrated entity and that the LCEPS was a subsidiary of the RLEA. Even if added to his complaint, those allegations, for the reasons stated above, would not have been legally sufficient to prove that an entity with more than fifteen employees employed plaintiff. See The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 23 (1st Cir. 1989) (amendment denied where "no meaningful indication that additional facts

could be pleaded which would make a dispositive difference.").

Because plaintiff sought amendments that would not have rescued his complaint from dismissal, the court denies both the plaintiff's motions for leave to amend his complaint.

VI. PLAINTIFF'S MOTION TO STRIKE.

When the defendants first filed their motions to dismiss plaintiff's section 1981 claim, the Circuit Court had not decided the second Gersman decision relied upon in this opinion. The issue of whether the Civil Rights Act of 1991 applied retroactively had not been determined in this jurisdiction. After the issue had been fully briefed, however, various cases in this district court and in other jurisdictions began addressing the retroactivity issue. Defendants' counsel chose to inform the court of the developing law on this issue through letters sent to

the court in chambers.

After defendants had sent chambers four such letters, plaintiff moved to prohibit these ex parte communications and to strike the letters from the record. Defendants defended their actions by stating that their letters were not ex parte because copies of the letter had been sent to all counsel. Defendants also argued that this practice violated no rules, and in fact was acceptable in the Court of Appeals under rule 28(j) of that court. This motion is of little importance now given the court's decision to dismiss all of plaintiff's claims. Nevertheless, the court is troubled by defendants' practice and is compelled to address its propriety.

The court at the outset notes that defendants' letters in fact are not ex parte, because copies of the letters were sent to all counsel. Nevertheless,

defendants' circulation of the letters does not cure their impropriety. Contrary to defendants' assertions, there is a rule that prohibits the sending of letters to chambers. Local Rule 106(b) states that "Except when requested by a judge, correspondence shall not be directed by the parties or their attorneys to a judge, nor shall papers be left with or mailed to a judge for filing." Defendants also are mistaken in their reliance on Fed. R. App. P. 28(j). That rule allows parties to send a letter to the Clerk of the appellate court when pertinent authorities come to the attention of counsel. That rule does not sanction the sending of such letters directly to appellate judges.

It is defense counsel's obligation to know these rules. Their purpose is to ensure that any argument a party wishes to make is made on the public record. These rules ensure this result by requiring that

parties file with the clerk of this court any papers on which it wants the court to rely. Plaintiff was within his rights to object, albeit belatedly, to defendants' actions.

Despite the impropriety of defendants' letters, the court cannot grant plaintiff's motion as fashioned. The communications are not ex parte so the court has no basis for granting a motion to prohibit ex parte communications. Nor can the court grant plaintiff's motion to strike because these letters never became part of the public record. Therefore, the court denies plaintiff's motion, but cautions defendants as to the legitimacy of their letter sending practice.

VII. DEFENDANTS' MOTION FOR SANCTIONS.

The last motion to be addressed is the defendant RLEA members and Kennedy's motion for sanctions against plaintiff. The court denies defendants' motions.

Under Fed. R. Civ. P. 11, this court can sanction a party only if his allegations are not well grounded in law or fact. While the court ultimately concludes that plaintiff's Title VII and ADEA claims are not cognizable, those claims were grounded in plaintiff's good faith arguments for an extension of the law, i.e. an expansion of the terms "employee" and "employer." The case law on the subject demonstrated that plaintiff's arguments were not without precedent. This court will not sanction a Title VII plaintiff unless his complaint was "frivolous, unreasonable, or without foundation." Christiansburg Garment v. EEOC, 434 U.S. 412, 421 (1978). That is not the case with plaintiff's Title VII and ADEA claims.

The court also concludes that plaintiff should not be sanctioned for his section 1981 claim. At the time plaintiff filed his complaint, neither this court nor

the Court of Appeals had determined whether the Civil Rights Act of 1991 could apply to retroactively cover plaintiff's termination claim. Plaintiff based his section 1981 termination claim on the argument that the Act should apply retroactively to his action. That was a viable legal argument. This jurisdiction's rejection of that argument does not justify sanctioning plaintiff.

Defendants' final basis for their motion is that plaintiff filed his complaint solely to get a quick settlement out of the defendants. The actions defendants refer to constituted nothing more than plaintiff's attempt to settle his claim without litigation. Plaintiff's counsel did contact defendants' counsel regarding a possible settlement before filing the complaint, but that is not sanctionable conduct. That sort of good faith dispute resolution, when successful,

saves the court's time and should be encouraged. Defendants' motion is denied.

VIII.CONCLUSION.

For the reasons stated, the court dismisses plaintiff's two actions. The court simultaneously denies plaintiff's motion for a default judgment against the defendant LCEPS, plaintiff's two motions for leave to amend his initial complaint, defendants' motion for sanctions, and plaintiff's motion to strike. An Order to that effect shall issue this date.

/s/
Royce C. Lamberth
United States District Judge

DATE: Apr. 2, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ALLEN, Plaintiff, v. EDWARD P. McENTEE, Chairman, Railway Labor Executives Association, et al., Defendants.	)	Entered May 12, 1993 Civ. Action No. 92-2151 (RCL)

MEMORANDUM AND ORDER

This case comes before the court on plaintiff's motion for consideration under Fed. R.Civ. P. 60(b). Plaintiff moves this court to reconsider its judgment of April 2, 1992 which dismissed with prejudice all of plaintiff's claims. Plaintiff's motion is DENIED for lack of jurisdiction.

Plaintiff filed his motion for reconsideration on april 16, 1993. Plaintiff then filed a notice of appeal on May 5, 1993. Plaintiff's appeal of this matter divests this court of jurisdiction over plaintiff's motion for reconsideration. See 7 Jeremy C. Moore et al., Moore's Federal Practice ¶60.30[2] (2d

ed. 1985). Accordingly, this court hereby DENIES plaintiff's motion for lack of jurisdiction.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: May 11, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES A. ALLEN	Received May 4, 1993
Plaintiff.	Civil No.
vs.	92-0776 (RCL)
RAILWAY LABOR	Consolidated Case
EXECUTIVES ASSO.	92-2151 (RCL)
Defendant.	

NOTICE OF APPEAL

Notice is hereby given this 4th day of May, 1993 that JAMES A. ALLEN hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of April, 1993 in favor of Edward F. McEntee, Chairman, Railway Labor Executives Association, and those persons listed on Attachment 2, hereto, which is incorporated by this reference, against said James A. Allen.

Walter T. Charlton, 186940
(703) 525-8387
2009 N. 14th St., Arlington,
VA. 22201
Attorney For
James A. Allen

CLERK: Please mail copies of the above Notice of Appeal to the following at the addresses indicated: See Attachment 1

PLEASE SERVE THE ATTORNEYS LISTED ON ATTACHMENT #1.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES A. ALLEN	Received May 5, 1993
Plaintiff.	Civil No.
vs.	92-0776 (RCL)
RAILWAY LABOR	Consolidated Case
EXECUTIVES ASSO.	92-2151 (RCL)
Defendant.	

NOTICE OF APPEAL

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Attorney For
James A. Allen

CLERK: Please mail copies of the above Notice of Appeal to the following at the addresses indicated: See Attachment #1

Please serve the attorneys listed on Attachment #1.